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INTEREST OF AMICUS

The interest of the State of Louisiana as *amicus curiae* is implied by Rules 29(4)(c) and 37(4) of this Court. In this case, petitioner asserts that the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 *et seq.*, has preempted Louisiana's community property laws[1] as applied to monetary value after its distribution from an ERISA-qualified pension plan to a plan beneficiary. By invoking federal statutory preemption under U.S. Const. art. VI, cl. 2 [Supremacy Clause] against "the application of an otherwise valid state enactment," *Hamm v. City of Little Rock*, 379 U.S. 306, 312 (1964) (citing *Hill v. Florida*, 325 U.S. 538 (1945)), petitioner seeks an "as-applied" nullification of state law pursuant to constitutional challenge. *Id. Cf. McCulloch v. Maryland*, 17 U.S. 316 (1819); *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218 (1947); *Maryland v. Louisiana*, 451 U.S. 725, 746-747 (1981).

Absent ERISA, Louisiana's community property laws are clearly applicable to the circumstances of this case. *T.L. James & Co., Inc. v. Montgomery*, 332 So.2d 834 (La. 1976) (holding that because civilian private law obligation itself of employer to pay compensation for employee's labor, even before such obligation was actually paid, was owed not to employee alone but to the community (partnership) between employee and spouse and since contributions of employer to retirement and profit-sharing plans were forms of compensation thus owed to community, employee's spouse was *at all times vested* with one-half ownership interest in compensation, including incorporeal, moveable right to share subsequently in proceeds of retirement and profit-sharing plans,[2] but further giving

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1. La. Civ. Code arts. 2325 *et seq.* *See also* La.Civ. Code arts. 86 *et seq.* and 889-890.1

2. Despite contrary positions taken by petitioner and U.S. Solicitor Gen-

recognition to then state statutes preserving integrity of such plans and limiting plan administrator's liabilities and responsibilities and (citing then La. Civ. Code art. 21, now La. Civ. Code art. 4) approving of procedure of equitable accounting among parties according to precise nature and proportion of each's interest, after distribution of proceeds[3]).

Anytime that Congress might statutorily attach unique, federal common law rules of property to certain money and displace the state's underlying civil law rules determining true ownership applicable to all other property within the state, simply because that money had been in an ERISA-qualified plan before its disbursement, the wholesome balance of good public order and equity with respect to private property rights in the state is necessarily threatened. It is submitted that such was not the intent of Congress in enacting ERISA; indeed, the beginning presumption is that Congress had no such intention. *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942); *Rice, supra*, at 230. Moreover, an interpretation of ERISA to avoid such a result would obviate future constitutional challenges that ERISA deprives owners of vested property rights and destroys the expectation of mu-

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eral, in Louisiana's civil law, the rights to delivery and possession are lesser-included rights which may be dismembered from ownership without a loss of ownership; ownership of property in civilian law may come into existence without a procedural act for actual delivery and possession or any other lingering vestige of common law feudal investiture. Accordingly, the ownership interest in compensation paid by the employer in the form of the retirement and profit-sharing plans does not wait until disbursement of proceeds from the plans before vesting.

3. The precise nature and proportion of each of these particular parties' interests were left pending in the state court proceeding brought by respondents; the state's highest court has not yet determined whether, or to what extent, an equitable accounting might be required of petitioner (or a person in this precise situation) or whether any accounting due would only be

tuality had by those in having contracted marriage in Louisiana and would thereby preserve ERISA's salutary purpose of renewing the fiduciary commitment of employers and plan managers to maintain solvency in their pension plans. In submitting this brief, Louisiana asserts its interest in the validity of its laws as they affect the state's good public order, should the other parties, in their quests for narrower goals, be indifferent to the potential consequences.

SUMMARY OF ARGUMENT

Community property is today considered the progressive system of marital property. Its partnership theory rectifies gender discrimination in the labor market. For example, Census Bureau statistics from 1991 show monthly pension distributions to married men are larger than those to married women by a ratio of 74 to 19. Once pension funds are distributed to spouses, community property law provides that they share them equally if earned during marriage.

It is impossible to find in ERISA some sort of covert message that community property is contra to federal policy. To the contrary, section 1056(d) specifically endorses "community property law" as the basis for a QDRO award and recognizes that the interest of the spouse of the employee exists under state law before such a court order.

Both Congress and this Court have long understood that the interests of spouses in community assets are equal. If the participant's wife has no interest in funds distributed out of a pension fund so that they are owned 100 percent by Husband, there is no equality. If Wife has no interest when the marriage ends by death, there is no equality. Yet Petitioner insists Wife has no interest until she divorces her husband. That just is not the "community property law" that section 1056(d) acknowledges.

ERISA's preemption section does not require this Court to concoct—under the rubric of preemption—a new federalized version of "community property" in which Husband's interest is much bigger than Wife's. A workable bright-line rule for pre-emption issues is this: state law has no application until pension funds are distributed out of the pension plan since the purpose of ERISA is to assure that plans are well-administered by fiduciaries who are freed from interference from state orders and state law claims. Once funds are distributed, state law fully attaches. State income tax is owed. State law defining what is a fraudulent use of the funds applies. All aspects of state property law apply.

The same bright-line test applies to the anti-alienation section of ERISA. Plan administrators are to ignore instructions from a participant to pay benefits to some third party (such as a creditor). However, once funds are distributed, they may be used, for example, to buy furniture and as the basis for a birthday gift to a relative—both alienations.

Under this sensible bright-line rule, the timing of an alienation document is irrelevant under ERISA so long as it has no impact on pension plan administrators and no effect *in rem* on pension funds until they fall under the control of state property law after distribution.

Example: Husband, Wife, and the parents of each sign in May an estate planning document in which each agrees to contribute $100,000 to a trust for the spouses and their children, with Husband promising to draw his $100,000 from a lump sum retirement payment he will be receiving in July. There is nothing in ERISA to prevent his undertaking from becoming binding after the funds are in his hands.

State law would apply similarly if in May Wife signed a will leaving her community half interest in the anticipated lump-sum distribution to her children, in June she died, and in

July the funds came into Husband's hands. Or the asset could be Wife's interest in attorney-Husband's contingent fee contract, with Husband winning his case after her death. Contingent interests are property under the laws of all states and are routinely subject to testamentary disposition. In *Boggs*, because of a unique Louisiana statute, Wife's will did not act *in rem* on pension benefits earned during marriage but to be distributed after her death. Husband was free to do as he wished with such funds, but the Boggs children did obtain through their mother a right to have the estate of Mr. Boggs restore funds equivalent to Wife's half interest. That is, what they inherited from Mother was a cause of action for an accounting.

Even if ERISA specifically announced that Wife could have no interest in pension funds distributed to Husband, such preemption would not deprive her of an alternate remedy. Surely Congress could not object if the state restored equality between the spouses by holding that when such a large block of earnings of one spouse are outside the standard marital partnership, community property does not apply to the marriage. Wife can treat her earnings as hers alone, including a non-ERISA pension she earned (e.g., as a state employee).

Another way the state could restore equality is to apply community property law to the marriage to the extent possible but to treat Wife as sole owner of one asset that would have been community (including cash) equal in value to what would have been the community interest in Husband's pension but for preemption. Such an "equalization" award is not a penalty imposed on Husband for having an ERISA pension but proper application of what is called the "aggregate theory" of community ownership long employed in Arizona. It is just such an equalization remedy that the Boggs children, claiming through their mother, seek to pursue in Louisiana courts.

Louisiana's proposed "bright line" interpretation of

ERISA's preemption and anti-alienation sections—building on the express endorsement in the QDRO section of "community property law"—is "fairly possible." As such it must be chosen over the construction that Wife can enjoy her state-law community property rights only if she divorces her husband. That theory involves Congress denying to the state the power to apply its own marital property laws to its citizens both during the marriage (after funds are distributed) and at dissolution of the marriage by death. There are serious doubts whether the Commerce Power authorizes Congress to effectuate such a major displacement of state domestic relations law, since the only theory for doing so could be the "national productivity" notion rejected in *United States v.Lopez*, 115 S. Ct. 1624 (1995).

ARGUMENT

Introduction

Petitioner, joined by the United States, here launches a direct attack on Louisiana's historic marital property system in which spouses share gains during marriage equally. They say that in the case of a spouse participating in an ERISA-governed pension plan who never divorces, all of the plan benefits, even after distribution out of the pension fund, must be owned solely by that participant spouse.[4] His wife's interest under community property law is stripped away, because only a Qalified Domestic Relations Order (QDRO) at divorce can recognize it. The pension for many couples is the most valuable of all assets that can be owned in community. *See Marriage of Brown*, 15 Cal.3d 838, 847, 126 Cal. Rptr. 633, 638, 544 P.2d

4. The participant here was Mr. Boggs. More men than women are ERISA-plan participants. U.S. Department of Labor, Pension and Health Benefits of American Workers at p. C-1 (1994). To avoid the cumbersome "participant spouse," this brief assumes the Husband is that individual.

561, 566 (1976). Indeed, in the case of a defined contribution plan with contributions well invested, the pension value at the time of Husband's retirement can exceed the total of all his earnings during the marriage, most of which will have been consumed.

Petitioner's theory will cripple Louisiana's community property system and that of similar community property states by making one spouse's share of the gains during marriage larger than that of the other spouse (unless, which will rarely be the case, both spouses have ERISA pensions equal in value). In some marriages, there will be other property constituting gains during marriage sufficient in value to enable the state to respond to the interference in spousal equality by making an offsetting award to the wife. But petitioner insists that Congress, through the preemption clause of ERISA, also prohibits such an attempt to restore equality.

In sum petitioner demands that Louisiana and other community property states mix marital partnership law with sole-ownership law derived from English common law and enforce against wives a 60-40, 70-30, 80-20, or even more unbalanced marital "partnership." Only if Wife will divorce Husband, says petitioner, can she enjoy an equal community of property. Perversely, she must end her marriage to obtain the martial partnership benefits of marriage.

Here is an example of the kind of unequal community Petitioner would foist on states like Louisiana. Both spouses, childless, have retired after many years on the job. Husband worked for a company with an ERISA-governed pension plan. He is receiving monthly benefits that, under petitioner's theory, are entirely his. Wife worked for the state and is receiving distributions from the state's civil service plan. These funds are community property because, petitioner insists, Louisiana cannot declare them her separate property in order to help

equalize the sharing between the spouses of gains during marriage. Each spouse uses monies from his or her pension distributions to buy lottery tickets, and each wins $500,000.

According to petitioner, Louisiana must let Husband bequeath $750,000 to his relatives but Wife can bequeath only $250,000. Moreover, petitioner's theory demands that Husband's creditors can reach the full $1 million, while Wife's can reach but $500,000, a problem for the wife if the amounts were smaller and she sought to be approved for credit purchases. La. Civ. Code art. 2345. If he acts promptly, Husband can control the investment of the full $1 million, Wife, only her winnings, which are community property subject to equal management. La. Civ. Code art. 2346.

Probably most community property states will have to respond to such a state of affairs by abolishing community property, making the spouses tenants in common of what is in the community at the time, and shifting to an English common law approach to ownership of future acquisitions.

Petitioner claims Congress actually intended to compel Louisiana either to enforce an unequal community system or abandon community property. This brief will demonstrate that Congress had no such intent.

I. ERISA does not preempt the substantive components of Louisiana community property law.

A. Community property is a sensible system for dealing with marital property, and Congress has no reason to seek to undermine it.

In 1983, the National Conference of Commissioners of Uniform Laws promulgated the Uniform Marital Property Act (UMPA), which adopts community property as the model this respected organization considered the best to deal with marital property issues. The prefatory note to UMPA declares that marriage is a partnership and that American states had lagged behind foreign nations in recognizing this through marital property laws. 9A Uniform Laws Annotated 97 (1987). The theme of UMPA is "ours," not "his and hers." *Id* at 99.

Wisconsin, which had been a "his and hers" state, soon enacted UMPA. Wis. Stat. Ann. §§766.001 *et seq*. (1984). Thus, any "trend" in the United States in the field of marital property, however small, favors community property over the separate property system built on English common law. In the noncommunity property states many couples achieve something similar by combining the earnings of both in one joint bank account, making it impossible for courts and lawyers to determine what should have been "his and hers" under a the common law system.

Community property arose in continental Europe as a means of recognizing the contribution of working wives that English law did not. The system was directed at working class families — farmers and herders. Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 Baylor L.Rev. 20, 28-39 (1967). In these families both spouses worked in the fields to raise crops and animals. Neither received a paycheck. There was no way to quantify the contribution of Wife or Husband to the success of the family operation. The logical solution was to treat them as partners.

A small number of couples still work together in the farmer-herder tradition. But it was not for them that Louisiana chose to retain community property as families became primarily urbanized in the first half of the 20th century. The new "mold" was for Husband to work at a job where he earned a paycheck, while Wife stayed home to take care of their home and usually raise children of the marriage. The work of the stay-at-home wife released the husband from home-based du-

ties performed by husbands of the farmer-herder days. The husband of the new mold had more hours to devote to making money due to the labors of the wife. In some situations she would entertain his business associates, but usually her contributions to the family wealth were indirect. During this stage of evolution of the American family, community property was lauded for giving the wife an ownership interest in gains she substantially, if indirectly, assisted her husband to acquire. Vaughn, *supra*, at 38.

Today the typical family is now headed by a two-earner couple. Both work outside the home. But community property continues to be a very sound approach for dealing with marital property problems of modern couples. First, it solves the "mommy track" problem. Working women with children often take time away from career advancement when the children are young, before returning to the labor market when the children are in school. When they re-enter the labor force, they have fallen behind the pace of advancements in rank and wage increases enjoyed by co-workers, many of them married men who have worked full-time while their wives took time out for parenting. The 1995 median weekly earnings of full-time employed married men was $610 and married women was $424. U.S. Bureau of Labor Statistics, Division of Labor Force Statistics Table A-4 (unpublished, 1995). Community property combines into a partnership "pot" the earnings of the wife who fell behind while following the "mommy track" with the earnings of her husband, who did not.

The second reason why community property well serves the typical two-earner couple of the beginning of the 21st century is its partial solution of the problem of lingering gender discrimination in the market place. Even women who have not taken time out for parenting, on average, earn less than

men.[5] Community property achieves equalizing through the marital partnership.

The equalizing achieved by community property law is most acutely needed with respect to distributed pension funds. According to Census Bureau figures for December 1991, the monthly income from pension distributions for married men in all states was $7,437,000, but for married women just $1,907,000.[6] This disparity must be caused in part by gender discrimination in employment and "mommy track" problems rather than solely the phenomenon of the stay-at-home wife earlier this century.

It is hard to imagine what objection Congress could have to a marital property system that deals so well with the mommy track and the gender discrimination issues. Congressional hostility is especially improbable in light of the rule in all nine community property states that this legal system of marital property is not mandatory. Spouses at the time of marriage or any time during it may contract for a "his and hers"

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5. The average annual income from full time jobs held in April, 1994 for 1992-93 bachelors degree recipients was $28,131 for men and only $22,853 for women; when income of these recent graduates is compared according to their undergraduate major, women's income exceeded men's in only three out of 12 categories: engineering, biological sciences, and humanities. Source: U.S. Dept. of Education, NCES, B&B: 94 Baccalaureate and Beyond 10/16/96. Computation by DAS-T Version 0.50. Recently graduated females are unlikely to have lost ground due to the "mommy track." *See also* Clifford Adelman, Women at Thirtysomething: Paradoxes of Attainment (U.S. Dept. of Education, 1992): "In only 7 of 33 major occupations did women achieve pay equity with men. In five other occupations, four of them in business-related fields, women who took more than 8 credits in college-level mathematics achieved pay equity. Outside of these areas and these conditions, however, the men of the Class of '72 were paid more than the women without children no matter what unit of analysis is applied."

6. U.S. Dept. of Commerce, Bureau of the Census Statistical Brief: Preparing for Retirement, Table I (1993)

marital property system applicable to them. La. Civ. Code art. 2328.

Even if many members of Congress — a modest majority of whom are from noncommunity property states — considered the common law approach to marital property superior to community property, no case has been made in Congress that the latter system is so foolish that there must be a federal policy to eradicate it. Indeed, the opportunity for dealing a perhaps fatal blow to the community property system was before Congress in 1948. An income tax crisis was brewing in the mid 1940s as several common law states including Pennsylvania, Oklahoma, and Hawaii shifted to community property for the sole purpose of income splitting (attributing to a stay-at-home wife half her husband's earnings to keep him out of a higher tax bracket). Congress, of course, chose to accommodate the community property states by authorizing income splitting for couples in all states.

B. ERISA evinces no congressional intent to bar states from treating as community property funds distributed from pension plans to a spouse

1. The REA amendments specifically embrace community property. Petitioner contends that the serious invasion by Congress of an area traditionally and rationally regulated by state law is compelled by the preemption section of ERISA, 29 U.S.C. § 1144(a). It provides that state laws which "relate to" ERISA pension plans are displaced. This Court recently held that "relates to" is so broad it cannot be taken literally in section 1144(a). *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1674, 1677 (1995). The phrase cannot even be defined by the Court. Rather preemption must be dealt with on a case by case basis based on "the objectives of the ERISA statute." *Id.* at 1680. In sum, the pre-

emption clause must be given a "common sense" meaning. *Pilot Life Ins Co v. Dedeaux*, 481 U.S. 41, 47 (1987).

An example of how the "common sense" approach to ERISA preemption would apply is apparent. Suppose Husband uses $250 worth of pension funds to buy a TV set, and the store insists he pay a six percent sales tax as well. He contends taxing his use of pension funds "relates to" the ERISA plan and refuses to pay. Common sense says this argument is absurd, and the reason is that once funds are paid out they become subject to state property laws, including tax laws. Petitioner and the United States assert ERISA "protects" Husband from claims by his wife, but that theory would lead to his also being protected from the state tax collector.

Blue Cross suggests that to assist the "common sense" approach to ERISA preemption, the starting point in the case by case analysis is what Congress specifically has said in ERISA about the state law allegedly preempted, here community property law. The section of ERISA that defines a QDRO refers specifically to community property. 29 U.S.C. §1056(d)(3)(b). A QDRO means a court order "which creates *or recognizes the existence of an alternate payee's right* to . . . a portion of the benefits . . . [and] is made pursuant to a State domestic relations law (*including a community property law*). § 1056(d)(3)(b)(i)(I) and (ii)(II) (emphasis added).

The phase "recognizes the existence of" when contrasted with "creates" can only refer to a community property interest, and it shows Congressional awareness that community property interests come into existence during the marriage, not just at the time of divorce. The theory of the United States that a wife could have no community property interest in the funds distributed from her husband's plan to him is flatly inconsistent with this passage of ERISA recognizing a spousal interest that arose before the divorce action. If, as is argued, the wife

has no interest during marriage, a QDRO could only "create" something new in the wife and could not "recognize the existence of" an interest she already had.

Other acts of Congress also reveal its understanding that under community property law the wife's interest in the husband's earnings arises not at the end of the marriage but during marriage. An Internal Revenue Code provision dealing with a tax benefit declares that for purposes of the earned income credit, the taxpayer's income "shall be computed without regard to any community property laws." 26 U.S.C. §32(c)(2)(B)(i). This is directed at a taxpayer claiming a credit during marriage and would not have been necessary if his spouse's community property interest were not already vested in her under state law.

Since ERISA itself in section 1056(d) recognizes that wives in community property states have an interest in the husband's pension before a QDRO is signed, petitioner cannot benefit from the theory of this Court in *Wissner v. Wissner*, 338 U.S. 655 (1950) to explain why the federal statute involved there did not have the effect of authorizing a husband to seize his wife's property rights. In *Wissner* a husband was permitted to direct distribution to his mother of 100 percent of national service life insurance he had earned during marriage. The Wife's complaint that this necessarily included her half interest under California community property law was rejected by this Court, which held that "[t]he statute establishes the fund in issue and forestalls the existence of any 'vested' right [in Wife] in the proceeds of federal insurance." 338 U.S. at 661. But the QDRO section of ERISA refers to a wife's community interest that already has an "existence" rather than being created by the QDRO. The interest is not "foresetalled" until the QDRO is entered.

Assuredly, the QDRO provisions added to ERISA by REA preempt state procedural laws concerning community rights

during marriage. Congress's intent is to protect pension plan administrators from possibly inconsistent (or vague) state court orders. A community property state could not compel the plan administrator to yield to a state court order requiring a pre-retirement distribution to Wife of her half interest in the community's portion of plan benefits because she was ill. But absence of such a remedy does not mean the wife's interest has no "existence." So long as state law does not impact on plan administrators but rather only on the spouses and those claiming through them, the common sense approach to ERISA preemption requires a holding that no state family property law needs to be displaced to effectuate federal interests.

2. The wife's interest does not arise by alienation or assignment from her husband. The wife's interest does not, as petitioner contends, come to her by alienation or assignment from the husband. Her ownership arises by operation of law.[7] Indeed, this Court long ago so held in its decisions authorizing a husband in a community property state to report his income as half owned by the wife. *Poe v. Seaborn*, 282 U.S. 101 (1930). If the theory of community property were that Husband acquired 100 percent ownership when he was paid but then transferred half to his wife, he would have been taxable on all of it before 1949.

In his dissent below, Judge Wiener termed Mrs. Boggs' will a prohibited alienation, assuming she was co-owner. 89 F.3d at 1182. Yet her will did not purport to divert benefits from Husband or any other beneficiary in advance of receipt of the benefits. On petitioner's theory not even Mr. Boggs could spend

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7. La. Civ. Code art. 2327, 2334, 2336. ("Legal regime" of community in Louisiana terminology means that the community property rules apply by operation of law, "legal" meaning "by law" as opposed to "by contract or assignment." See also *T.L. James & Co., Inc. v. Montgomery*, 332 So.2d 834, 851 (La. 1976).

any of the distributed funds to buy food, clothes, the TV set in the hypothetical, etc. These are alienations. Obviously the anti-alienation provision of ERISA, 29 U.S.C. §1056(d)(1), is restricted to alienations or assignments which the plan administrator is supposed to honor when making subsequent distributions. To protect plan administrators, ERISA allows such assignments to be ignored.

The United States seems to say that the first Mrs. Boggs's will may have been effective to bequeath a half interest in funds already paid out to her husband and on hand at her death but could not affect future distributions. This is inconsistent with the REA language stating that a community property interest of a participant's wife is in "existence" prior to divorce even though there has been no distribution. Not a word in ERISA suggests there is no such existence when death dissolves the marriage, instead.

Louisiana law has long recognized that community property rights of a wife exist in contingent interests earned by Husband that may vest after the marriage has ended or may never vest. An attorney-spouse's contingent fee is an example. *Dué v. Dué*, 342 So.2d 161 (La. 1977). If Wife dies while husband is trying the case, her will of her community share of the fee will be effective if Husband wins but of no use to her legatee if he does not.

Moreover, the United States and petitioner fail to deal with the fact that under Article 538 of the Louisiana Civil Code, what respondents received under their mother's will was not a right *in rem* in any pension funds Mr. Boggs might later receive. He could do whatever he wanted with those funds; at Mr. Boggs's death his estate was liable to account to respondents. *Id.* Their acquiring the cause of action to compel an accounting is far removed from any alienation of an interest in specific funds to be distributed.

3.ERISA does not seek uniformity, nor would uniformity be achieved by the kind of preemption petitioner seeks. The United States argues that preemption of Louisiana law is essential to avoid "a multiplicity of possibly conflicting state regulation" of pensions. Brief Amicus Curiae for United States at 24. ERISA does indeed seek the benefits of a uniform law to guide pension plan trustees in their administration of the plans. But section 1056(d) makes it clear that Congress has determined uniformity is not needed with respect to a wife's rights in the husband's pension plan. This section of ERISA defers to state divorce courts to award the wife a half interest as community property, an equitable distribution share of one third, two thirds or any fair share. The state court is free to award nothing at all if the state uses "fault" principles in dividing marital property and the wife was, for example, an adulteress. 29 U.S.C. § 1056(d)(3)(C). ERISA also gives the state court the option to order payouts to the wife on the date the ex-husband could retire but does not, or to wait until he does retire. *Id.*, subsection (E).

Moreover, if ERISA demands uniformity, the unequal community theory petitioner says Congress is forcing on community property states (See Part II, *infra*) has to be applied in common law states as well. In fact, substantive uniformity could be obtained only if the courts were to fashion a *detailed federal common law system of marital property*.

It is *procedural* not substantive uniformity that ERISA seeks. Plan operators can disregard any court order not in the form of a QDRO. The intra-family litigation in the case at bar has no impact on plan administrators.

Moreover, even if Congress tried to directly abolish community property across the United States and impose on all states via the Supremacy Clause a uniform marital property system, because of Due Process considerations, it would take

decades to achieve the goal. Millions of wives now have vested interests in marital assets, at least those other than an ERISA pension in the husband's name. And there are also still alive millions of wives that had ownership interests in pensions before enactment of ERISA in 1974 when many pension plans came under the control of that statute. Under the Fifth Amendment Due Process Clause these property rights of wives will endure until all such women are dead.

II. ERISA does not compel Louisiana to enforce an "unequal" community property system; thus the state can make an equalizing award to accommodate limited preemption while retaining the essence of community property theory.

Assume arguendo that the courts below erred in holding the legatees of the first Mrs. Boggs could ask the state courts, in their action to account, to classify as community property of the first marriage sums paid out by Mr. Boggs' pension plan. Due to preemption the first Mrs. Boggs could have no interest *in rem* in those funds. It does not follow, however, that respondents have no remedy at all. They should be entitled to pursue in state court a right derived from their mother to remedy the disruption of equal sharing of gains resulting from the preemption holding. The Boggs children will assert their mother's rights to an equalizing award. That is, if Husband can withdraw a major asset from the community partnership, to maintain an equal partnership Wife can claim sole ownership of other assets of equal value (including money) that would have been community.

In other words, the Boggs children urge that Louisiana can respond to the fact that Mr. Boggs claims sole ownership of the pension in his name by employing, when the marriage ends at death, the "aggregate" rather than the item theory of community ownership. Louisiana employs the aggregate theory at divorce. La. R.S. 9:2801. This allows a court to award a wife the

entire community interest in, for example, a residence and the husband the entire interest in a community business of equal value.

At dissolution of marriage by death, on the other hand, a majority of community property states employs an "item" theory that permits the deceased spouse to bequeath only his half interest in each community asset. William A. Reppy, Jr. and Cynthia Samuel, *Community Property in the United States*, 19-5 (1994). However, Arizona has long used the aggregate theory at death of a spouse, allowing, for example, the first to die to have $200,000 in community property proceeds from a community-owned policy on his life go to a third party if he devises a $100,000 interest in his share of other community assets to the surviving wife. *Gaethje v. Gaethje*, 8 Ariz. App. 47, 442 P.2d. 870 (1968).

Respondents are not precluded by ERISA from asking Louisiana to follow the Arizona precedent at dissolution of the marriage by death. An "equalizing" remedy is not some sort of penalty imposed on a husband for invoking rights under ERISA. Instead, it is a reasoned response rooted in ample precedent to avoid the state's having to recognize a 60-40, 70-30, etc. "community."

At the very least, if Louisiana itself cannot, by adopting in the dissolution by death context the aggregate theory it uses at divorce, respond to the problem of the unequal community, *federal common law* must do so. Petitioner seems to have lost sight of the fundamental principle that when the Supremacy Clause results in displacement of state law, it is *federal common law* that fills the gap. *See Lividas v. Bradshaw*, 114 S.Ct. 2068 (1994). Unfortunately, as this Court noted in *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956), there is no existing body of *federal common law* for domestic relations to draw on that might have been developed under the reign of *Swift v. Tyson* or in federal question litigation.

True it is that in a few cases of "gap" in a federal statute — often due to failure to provide a limitation of action period — state law is chosen to fill it. *See Board of County Commrs v. United States*, 308 U.S. 343 (1939). Petitioner attributes to Congress a scheme that borrows Louisiana law that all earnings during marriage are co-owned by spouses with the theory drawn from common law that the husband is sole owner of the pension in his name. *County Commissioners* makes clear that the resulting hybrid (the unequal community) must have come from *federal common law.* It is totally foreign to Louisiana.

Congress would not tolerate such a concoction, especially since, as indicated above, it has significant disparate impact on women because fewer wives than husbands earn pensions in their names, and for those wives that do, the value is on average smaller than the value of the typical husband's pension. It is far more likely that if Congress, as contended by petitioner, actually intends to bar community property states from granting the wife or those claiming through her an equalizing award, the federal common law to solve the problem created by ERISA preemption with respect to Husband's pension would be borrowed from the modern common law of one of the noncommunity property states. That is, Louisiana could, rather than restore an equal community through application of the aggregate theory, hold that the marriage is governed by the majority rule that Wife is sole owner of all she earned, Husband of all his earnings.

Since many Louisiana couples presently own as community an ERISA-governed pension, to shift via federal common law to a "his and hers" approach would be highly destructive of the community property system and create two classes of married persons in the state. Or should the federal common law rule based on English common law be applied to all Louisiana marriages, to prevent the problem of dual marital property systems?

This court, in *United States v. Yazell*, 382 U.S. 341 (1966), indicated its distate for creating federal family law. It avoided doing so by borrowing all aspects of state family law at issue rather than concocting a federal-state hybrid based on partial borrowing. This Court declared that the alternative with regard to the need to find some body of family law so a federal scheme could be implemented was "We should . . . invent one and impose it on the states." 382 U.S. at 353.

Petitioner cites *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), and *Wissner v. Wissner*, 338 U.S. 655 (1950) and *Free v. Bland*, 369 U.S. 663 (1962) as support for her theory that ERISA forbids Louisiana from making an equalizing award if Mr. Boggs can withdraw his pension from the gains co-owned in community. Brief for Petitioner at 19-20. *Hisquierdo* and *Wissner* are distinguishable because they dealt with a husband's claims to federal disbursements of federal funds. This Court itself in *Hisquierdo* distinguished a government pension from a private pension merely regulated by ERISA. *Hisquierdo*, 439 U.S. at 590 n.24. *Free v. Bland* was largely superseded by *Yiatchos v. Yiatchos*, 376 U.S. 572 (1964), which allowed states to bar a husband's manipulation of federal statutes, such as those concerning U.S. savings bonds, to strip their wives of testamentary powers. Moreover, it appears from the brief discussions about no offsetting award that this Court was not fully aware in these cases of the effect of creating an unequal marital property system as a matter of federal common law with especially strong disparate impact on women.

III. The construction of ERISA that interferes with basic principles of family law in Louisiana must be rejected because it raises serious constitutional problems while another reasonable construction does not.

When one construction of a statute "would raise serious constitutional problems," *Edward J. DeBartolo Corp. v. Florida*

Coast Bldg & Constr. Trades Council, 485 U.S. 568, 575 (1988), this Court will adopt a construction that avoids constitutional issues, if that is "fairly possible." *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979).[8] Congress invoked both its Commerce and Taxation powers as authorizing enactment of ERISA. 29 U.S.C. §1001. Only the Commerce Power could possibly permit Congress to displace state family laws providing for equal sharing by spouses of gains during marriage. *United States v Lopez*, 115 S. Ct. 1624 (1995), raises a real doubt as to the constitutionality of ERISA as Petitioner would have it applied. This Court thus should adopt the "fairly possible" interpretation that leaves state community property laws substantively intact.

A. Co-ownership by spouses of pension benefits has no nexus to interstate commerce. Congress was correct in declaring in section 1001 that the process of administering pension plans is part of itnerstate commerce. The section also properly asserts federal power to control aspects of such administration listed there: vesting requirements, funding minimums, and the like. Congress's assertion of the Commerce Power in order "to protect . . . participants" in pension plans is confined in section 1001(b) to administrative concerns: "establishing [via ERISA] standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and . . . providing for appropriate remedies, sanctions, and ready access to the Federal courts."

REA's procedural preemption of state divorce law by requiring use of QDROs to protect plan administrators from the

8. This maxim of construction was not invoked in the lower courts. However, statutory construction was the issue litigated in both the trial court and the Fifth Circuit, permitting a new twist on the interpretation to be made for this first time in the Court. *United States v. Speers*, 382 U.S. 266, 277 n. 22 (1965) ("novel" interpretation argument property raised for first time in Supreme Court).

burden of uncertain judgments also assists the free flow of commerce. Congress also has the power to address the issues raised in this case by requiring QPOs (qualified probate orders). In each of these applications of ERISA the nexus to interstate commerce is clear.

Federal interference with state law of family property —especially when state law attaches only to benefits after they are paid out of a pension plan — is a very different issue. Petitioner and the United States seem to impute to Congress the notion that community property is bad for commerce. Even an explicit statement by Congress to that effect would not eliminate Tenth Amendment problems. A federal interest in safe schools did not create a nexus to interstate commerce in *Lopez*. Likewise, federal dislike of community property cannot itself create a nexus to interstate commerce. This Court requires that the nexus be actually demonstrated.

In only one prior case has this Court considered the constitutionality of a federal law construed so as to preempt state community property law. *Wissner v. Wissner*, 338 U.S. 655 (1950). *Wissner* involved exercise by Congress of the War and Defense Power, and the morale of servicemen who will be called on to repel an invasion of the nation is of genuine federal concern. But this analysis cannot be transferred to the context of private workers in interstate commerce. The idea that happy workers produce more and hence the federal government can do anything it wants to make them happy is just a restatement of the "national productivity" theory for invoking the Commerce Clause rejected in *Lopez*. 115 S. Ct. at 1632. Just as in *Lopez*, under the happy-worker "reasoning Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example." *Id*.

B. There is no nexus to interstate commerce in a state's ac-

tions in intra-family litigation to equalize overall spousal interests in gains during marriage after limited federal preemption. Assuming arguendo that Congress has the power to declare the employee husband sole owner of pension funds after distribution from an ERISA-governed plan, although they would be community property under state law, a second serious constitutional problem arises. Does the Commerce Power entitle Congress to forbid a state, in litigation not involving plan administrators but rather affected family members themselves or against the estate, from entering what this Brief has termed an equalizing award?

This requires the Court to inquire if there is any impact on interstate commerce if Louisiana takes corrective action to make equal a community of property that has become unequal. Whatever theory petitioner may invoke to find in the Commerce Clause a power to compel Louisiana to accept an unequal community will be indistinguishable from the "national productivity" theory rejected in *Lopez*. Petitioner's theory necessarily would enable Congress to take from the states control of every detail of marital relations law from the moment of marriage to its dissolution by divorce or death.

These serious constitutional problems also mandate adoption of the construction of ERISA urged by respondents and Louisiana.

CONCLUSION

For the foregoing reasons, Louisiana urges this Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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